UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17

ESSIG & ASSOCIATES, INC., A MCDONALD'S FRANCHISEE, AND MCDONALD'S USA, LLC, JOINT EMPLOYERS	Case 14-CA-125416
and	
KING'S MANAGEMENT CO., INC., A MCDONALD'S FRANCHISEE, AND MCDONALD'S USA, LLC, JOINT EMPLOYERS	Cases 14-CA-127084 14-CA-136194
and	
L.W. PROSPECT, INC., A MCDONALD'S FRANCHISEE AND MCDONALD'S USA, LLC, JOINT EMPLOYERS	Case 14-CA-138590
and	
THE SAVAGE GROUP, LLC, A MCDONALD'S FRANCHISEE, AND MCDONALD'S USA, LLC, JOINT EMPLOYERS	Case 14-CA-140976
and	
WORKERS' ORGANIZING COMMITTEE-KANSAS CITY	

L.W. PROSPECT, INC. AND THE SAVAGE GROUP, LLC'S
JOINT MOTION TO SEVER

Respondents L.W. Prospect, Inc. and The Savage Group, LLC join in this Motion to Sever, pursuant to the National Labor Relations Board (hereinafter "Board") Rules and Regulations, Section 102.33(d), and respectfully request the Associate Chief Administrative Law Judge or his/her assignee (the "ALJ") order severance of these proceedings such that the cases against L.W. (Case 14-CA-138590) and Savage (Case 14-CA-140976) are severed from each other and from those cases involving separate independent Franchisees (Essig & Associates, Inc. and King's

Management Co., Inc.). Indeed, the independent Franchisees are not alleged to have any joint employment relationship with each other.

BACKGROUND

Throughout the charge investigation process, L.W. Prospect, Inc. ("L.W.") and The Savage Group, LLC ("Savage") have been represented by LaPointe Law, P.C., (collectively the "Franchisees"). While L.W. and Savage are independent small businesses and have nothing in common with each other or the remaining Respondents, other than the "McDonald's" brand name and the nature of their business, L.W. and Savage's interests align in their respective interest to sever these proceedings.

L.W. independently operates a franchise of McDonald's USA, LLC ("McDonald's") at 1421 Prospect Avenue in Kansas City, Missouri. Lewis and Gloria Webb, a husband and wife team, have owned L.W. since 1990, and employ approximately 55 individuals in their restaurant. Since L.W. was established twenty-five years ago, the Webbs have been the only employer of the employees working at the restaurant. Now, nearly a quarter of a century later, Charging Party has alleged for the first time, that the company is a "joint employer" with McDonald's and has violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("Act"). L.W. vigorously denies the allegations in the Second Consolidated Complaint, and looks forward to the opportunity to defend itself at the hearing.

Likewise, Savage independently operates a franchise of McDonald's at 4101 Kansas Avenue in Kansas City, Kansas. It is also owned by a husband and wife team, Cassandra and Ken Savage. They have operated this franchise for several years, and employ about 55 people. The only allegation against this franchise is that it did not consistently enforce its longstanding policy regarding not allowing employees to eat in the lobby of the restaurant while they are on break.

Neither L.W. nor Savage has any information regarding Essig & Associates or King's Management, the other named franchisees. They, like L.W. and Savage, are completely separate and autonomous businesses with their own counsel in these proceedings. L.W. and Savage do not even know what charges have been brought against these other two independent franchisees.

However, L.W.'s and Savage's ability to mount their defenses has been severely prejudiced by the General Counsel's abuse of discretion in consolidating the prosecution of these charges with each other, and with two other franchisees. Rather than simply being evaluated on the merits of the run-of-the-mill Section 8(a)(1) and (3) allegations and promptly developing a strategy for resolution, L.W. and Savage are now involved in a consolidated case with four franchisees and five unfair labor practice charges, and factual allegations that are wholly unrelated to the straightforward claims against them.

There is simply no factual connection between the complaints themselves--or between L.W. and Savage--to justify consolidation. Rather, the sole factor these cases have in common is the "McDonald's" brand name. This, in and of itself, does not serve as a basis for consolidation. The General Counsel's decision to consolidate these cases is an abuse of discretion given the particularized nature of the Franchisees' respective cases, and given the high propensity for prejudice to each party's ability to effectively present evidence free of conflation with separate cases and legal issues. The General Counsel's action undermines the purpose of the Act, and the ALJ should sever L.W.'s and Savage's cases from each other and from all remaining cases.

ARGUMENT

I. THE CONSOLIDATION OF THESE FACTUALLY DISTINCT CASES IS AN ABUSE OF DISCRETION BY THE GENERAL COUNSEL.

Board Rule § 102.35(a)(8) gives an Administrative Law Judge the ultimate authority over the General Counsel to consolidate or sever proceedings. *See i.e. Serv. Employees Union, Local*

87, 324 NLRB 774, 775-76 (1997) ("The judge has the discretion to determine when consolidation, or severance, of any complaint is warranted, considering such factors as the risk that matters litigated in the first proceeding will have to be relitigated in the second and the likelihood of delay if consolidation, or severance, is granted.") [emphasis added]

While the General Counsel has some prosecutorial discretion, he may only consolidate cases when it is "necessary in order to effectuate the purpose of the Act or to avoid unnecessary costs or delay." *See* Board Rule § 102.33(a). The General Counsel's discretion is not unbounded and is subject to review for an abuse of discretion. *See Service Employees Union, Local 87 (Cresleigh Management, Inc.)*, 324 NLRB 774, *2 (1997). For the reasons discussed below, the General Counsel has abused his discretion, because: (1) consolidation is not "necessary" in order to effectuate the purposes of the Act; and (2) consolidation does not "avoid unnecessary costs or delay." In fact, consolidation does the exact opposite.

A. Consolidation is not "necessary in order to effectuate the purposes of the Act."

Since it is not against the Act to be a "joint employer," it is entirely unclear how consolidation is "necessary" to effectuate the Act. The issue of whether L.W. or Savage is a "joint employer" with McDonald's (they are not) is merely an issue of secondary derivative liability. Without a violation of the Act, the "joint employer" issue that the General Counsel holds so dear becomes moot. *See i.e. NLRB v. C.C.C. Associates, Inc.*, 306 F.2d 534, 539 (2d Cir. 1962).

Even if L.W. or Savage did violate the Act (they did not), a joint-employer relationship cannot be determined "class-wide." It is well-established that the General Counsel has the burden to prove a joint employer relationship for each individual Franchisee. *See Floyd Epperson*, 202 NLRB 23, 26 (1973) ("each case involving the 'joint employer' issue must be decided on the individual facts of the particular situation"); *Solid Waste Servs., Inc.*, 313 NLRB 385, 388-89

(1993) ("the question of joint employer status must be decided upon the totality of the facts of the particular case"); *see also Boire v. Greyhound Corp.*, 376 U.S. 473 (1960). Thus, evidence heard on derivative liability for one franchisee would be irrelevant as to a second franchisee. So again, it is entirely unclear how consolidation is "necessary."

Moreover, since L.W.'s and Savage's mundane 8(a)(1) and (3) violations can be remedied with a simple notice posting, a finding of derivative liability is completely unnecessary. Because L.W. or Savage, the primary parties, can undoubtedly comply with any order against them (that is, post a notice), McDonald's relationship as a "joint employer" is wholly irrelevant. *See C.C.C. Associates,* 306 F.2d at 539 ("If the party primarily charged is in fact able to comply with the order against it, it will be unnecessary to consider derivative responsibility at all.") [emphasis added]. In point of fact, McDonald's can do absolutely nothing to remedy any of the alleged violations of the Act. Since the allegations do not involve any McDonald's employees or facilities that McDonald's operates, McDonald's has no ability to post a notice, pay back or front wages, or offer any other relief.

Thus, it makes no sense for the General Counsel to consolidate four cases based solely on his novel joint employer theory. Even if the joint employer issue were relevant or justiciable, it must be established on an individual basis. Consolidation for this purpose does nothing to "effectuate the Act," and it certainly is not "necessary" as Board Rule § 102.33(a) requires.

B. Consolidation does not "avoid unnecessary costs or delay."

The Order to Consolidate has already created a needless waste of financial resources and unnecessary delay. Now, L.W. and Savage are forced to participate in overly-complicated, multi-party litigation, which could otherwise be resolved in a matter of days. The litigation is severely out of proportion, which creates a substantial fairness issue, and is, quite simply, cost prohibitive

for the Franchisees to present a meaningful defense. For example, L.W. and Savage must have a presence throughout the entirety of these proceedings in order to present their defenses, point out any relevant distinctions in the operation of their restaurants, and establish their unique relationships with McDonald's. Both Franchisees must participate in unnecessarily complicated motion practice for not only each other, but also for the Essig & Associates and King's Management charges, as well as consider all of the relevant conflicts that co-defendants must face in any litigation. Obviously, this gratuitous litigation generates significantly higher legal costs, even though the charges are quite routine and can be remedied with a posting. In short, the Order to Consolidate acts as an improper "war of attrition"--the General Counsel is forcing the small business owners into concession by creating complex litigation. L.W. and Savage simply do not have the financial resources to mount a proper defense in a proceeding of this size, especially when the remedy is non-monetary.

The added motion practice, the multiplied filings, and the sheer number of attorneys involved, will also undoubtedly strain judicial resources. The numerous parties involved will include counsel for each of the four Franchisees, counsel for McDonald's, counsel for the General Counsel, and counsel for the Charging Party. As stated previously, each of these parties will need to be present and participate at each stage of the consolidated proceedings in order to properly track the progress of the case and protect their respective clients' conflicting interests throughout the hearing. Trial preparation will involve the exchange of likely thousands of documents between the parties. Because each involved party will be entitled to question each witness, witnesses will need to be prepped to endure direct examination, as well as multiple rounds of cross examination. The inevitable disputes over discovery will, no doubt, result in numerous costs and delays to the overall proceedings.

Moreover, the Franchisees--and the indeed the alleged Discriminatees like James Hetrick--will be delayed in the resolution of their case by being forced to participate in wholly irrelevant proceedings. *See i.e. Wai Feng Trading Co. v. Quick Fitting, Inc.*, Case No. 13-033S/13-056S, 2014 U.S. Dist. LEXIS 117251, at *13 (D.R.I. May 30, 2014) ("Consolidation that would unnecessarily delay [another] case is inappropriate."); *see also Accent Maintenance Corporation*, 303 NLRB at 300 (denying a motion to consolidate explaining that where a case was ripe for decision the parties "are entitled to have their respective rights and obligations determined with reasonable dispatch."). This trial has already been unnecessarily delayed for perhaps years, as the case will be held in abeyance while the remaining "McDonald's" litigation in Region 2 lumbers on (*See* Lewis Foods of 42nd Street, LLC, *et al.*, Case Number: 02-CA-093893 *et al.*) In L.W.'s and Savage's cases, the evidence could be presented and the case resolved in a matter of days. Rather than simply presenting their defenses and receiving a timely determination on the allegations, resolution for the Franchisees, the Discriminatees, and the Charging Party will be unnecessarily delayed, because the General Counsel must first litigate four other cases in Subregion 17, not mention 60 other cases in Region 2.[1]

II. CONSOLIDATION PREJUDICES EACH PARTY'S ABILITY TO MOUNT A DEFENSE IN THIS ACTION.

Even if the General Counsel has not abused the "discretion" afforded to him by the Act, the prejudice that his "discretion" has imposed on L.W. and Savage cannot pass Constitutional

[1] *See. e.g., CNN America, Inc.*, Case Nos. 05-CA-31828 and 05-CA-33125, reviewing whether CNN and its former subcontractor were joint employers under the Act. While this case concerned only two corporate entities and two unfair labor practice charges, it took 82 days to try and involved "16,000 pages of transcript and over 1,300 exhibits." *CNN America, Inc.*, Case Nos. 05-CA-31828 and 05-CA-33125, 2008 WL 6524258, at *1 (N.L.R.B. Div. of Judges Nov. 19, 2008). This case was pending before the Board for over five years before the Board finally issued a decision on September 15, 2014. *See* 361 NLRB No. 47. By comparison, given the size of this case as currently consolidated, it is likely to take much longer than *CNN America, Inc.* to conclude.

muster. Consolidation of these cases robs the Franchisees of their opportunity to be heard, distorts their individual defenses, and violates their right to due process.[2]

Other courts considering the propriety of consolidation look at whether it "den[ies] a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged in the claims or defenses of others that irreparable injury will result." *Garber v. Randell*, 477 F.2d 711, 716-717 (2d Cir. 1973); *see also In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) ("Although consolidation may enhance judicial efficiency, 'considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial.'"). In *Malcolm v. Nat'l Gypsum Co.*, the court reversed the district court's consolidation of asbestos litigation noting the "dizzying amount of evidence" regarding each victim's work history, disease pathology, level of exposure, and location of exposure. *See Malcolm*, 995 F.2d 346, 349 (2d Cir. 1993); *see also Garber*, 477 F.2d at 716-717 (finding that consolidating the complaints of various plaintiff stockholders against numerous defendants presented issues of "serious prejudice" explaining that "to be joined with numerous unrelated claims by other purchasers against some 50-odd other defendants in one 'mixed bag' type of consolidated complaint would be fundamentally unfair…").

Here, the disparate issues involved and the number of parties--including four Respondents, McDonald's, and countless witnesses--create a due process concern. The presentation of evidence involving five unfair labor practice charges and the case-by-case adjudication of McDonald's as a joint employer, threatens to overwhelm the evidence L.W. and Savage will present in their own defenses. While the Franchisees' evidence will be specific to their policies with regard to employee discipline and communications, there is a great potential for confusion and conflation of the factual

[2] Already, Subregion 17 has admittedly failed to serve both L.W. and Savage with the instant Complaint. How can basic due process be guaranteed when the Region cannot even serve a third of the parties with the Complaint?

distinctions with other Franchisees. *See e.g., Arnold v. Eastern Air Lines*, 712 F.2d 899, 906 (4th Cir. 1983) (reversing a decision to consolidate cases and holding that "considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice."); *see also, Schneck v. IBM*, Case No. 92-4370 (GEB), 1996 U.S. Dist. LEXIS 10126, at *18 (D.N.J. June 24, 1996) (denying a motion to consolidate explaining that "[t]he critical facts and factual issues are unique to each case, and a consolidation of these individual factual issues would result in inevitable jury confusion and a trial setting highly prejudicial to IBM.").

The parties involved, the claims, and the disputed practices, all vary amongst Respondents. Notably, L.W. and Savage each drafted and maintain their own employee handbooks, and each maintains their own work rules, scheduling policies, and procedures. The resolution of the claims against the L.W. and Savage will simply require that each Franchisee present evidence pertaining to their work rules and testimony from a few supervisors. The employees and supervisors in question do not work for any of the other Respondents in this consolidated complaint. And, the events in question involve only the individual Franchisees and are only alleged to have occurred at the restaurants located at 1421 Prospect Avenue and 4101 Kansas Avenue in Kansas City.

There is also an extraordinary burden placed on these small businesses by attending and/or maintaining an attorney presence at the proceedings for months on end. At any moment, any witness may say something that detrimentally impacts the Franchisees. Accordingly, L.W.'s and Savage's attorneys must be present to hear testimony and cross-examine witnesses, if for no other reason than to limit the witness' testimony so that it does not negatively impact them. Nevertheless, this undue and unwieldy investment would be necessary to fully protect the Franchisees'

constitutional rights and interests, because while much of the testimony will have nothing to do with either L.W. or Savage, the General Counsel will seek to use some of it against them.

So, not only are the Franchisees trapped in a monstrosity of this consolidated unfair labor practice proceeding with no way out, but because of the General Counsel's consolidation, L.W. and Savage are placed in a calamitous predicament. They must either decide to have their counsel of choice participate during the entire proceeding, as is their constitutional right, at extraordinary expense, or they must abandon their constitutional right and not have their attorneys present. If the Franchisees choose the latter, they risk not having their own attorneys properly refute testimony that is relevant and potentially detrimental to their business interests. To require L.W. or Savage to make this "Hobson's choice" is unfair, unconstitutional, and severely prejudicial. Burdening the exercise of a constitutional right in such an unprecedented way is akin to depriving one of it altogether.

Further, managing a consolidated trial of this size is unnecessary complex and a logistical challenge for all parties. While the Franchisees understand that the ALJ will strive for objectivity throughout the proceedings, it is also undeniable that hearing evidence regarding purported Section 8(a)(1) and 8(a)(3) violations against multiple independent Franchisees--which do not involve L.W. or Savage and have no legal bearing on their liability--will prove prejudicial. Particularly where consolidation is not justified by the benefits of added efficiencies, it becomes an entirely vain exercise.

Indeed, the Board has repeatedly held that consolidation is inappropriate where, as here, the cases involve different units of employees and different factual backgrounds. *See e.g., Accent Maintenance Corporation*, 303 NLRB 294, 299-300 (1991) (denying a motion to consolidate cases where "the events of the Complaint are also distinct and involve separate issues of law and fact.");

Venture Packaging, Inc., 290 NLRB 1237, 1237 n.1 (1988) (denying a motion to consolidate cases where the charging parties and the issues in the cases differed); *c.f. Beverly California Corporation,* 326 NLRB 232, 236 (1998) (involving the "unprecedented" consolidation of 17 cases but where each charge was against one corporation and its wholly-owned subsidiaries). In *United States Postal Service,* 263 NLRB 357, 367 (1982), for example, the Board upheld the ALJ's denial of a motion to consolidate two cases dealing with different post office branches. The ALJ explained that there was no indication that the charging party in one case had any contact with the respondent or the officials involved in the other case. *Id.; see also, The Dow Chemical Company*, 250 NLRB 748, 748 n.1 (1980) ("The motion to consolidate is hereby denied inasmuch as the cases involve different units of employees and raise issues which, in view of the varying allegations of the complaint and different factual backgrounds, are best considered separately."); *King Broadcasting Company*, 324 NLRB 332, 339 n.12 (1997) (denying a motion for consolidation where the case dealt with "development of subtle and extensive labor-management dynamics").

Finally, the General Counsel is setting a dangerous precedent. Presumably all other franchise models will now be subject to the same threat of complex multi-party litigation for relatively minor ULP violations. Does the General Counsel now have the "discretion" to stock-pile ULP charges nationwide, and then prosecute *en masse*? The Order to Consolidate is a threat to the closely-regulated franchise model that Congress, the courts, and the marketplace have so carefully developed and encouraged.

CONCLUSION

For the foregoing reasons, L.W. and Savage respectfully request the ALJ to order the severance of cases against each distinct Franchisee.

Dated: March 18, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney admitted to practice before the Courts of the State of Illinois, affirms under penalty of perjury, that, on March 18, 2015, he caused a true and correct copy of Respondents L.W. Prospect, Inc. and The Savage Group, LLC's Joint Motion to Sever to be served upon counsel for parties by e-mail (where indicated) and/or first-class mail in a postage-prepaid, properly addressed envelope at the following addresses designated for this purpose:

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